

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs May 10, 2006

**STATE OF TENNESSEE v. JOSE E. MOLINA<sup>1</sup>**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2003-B-1303 Cheryl Blackburn, Judge**

---

**No. M2005-01033-CCA-R3-CD - Filed July 25, 2006**

---

The defendant, Jose E. Molina, was convicted of aggravated rape, a Class A felony, and aggravated robbery, a Class B felony. See Tenn. Code Ann. §§ 39-13-502, -402 (2003). The trial court imposed a sentence of twenty-one years for the aggravated rape, to be served at one hundred percent, and a concurrent sentence of nine years for the aggravated robbery. In this appeal, the defendant asserts that the trial court erred by denying his motion to suppress a pretrial identification and that the evidence was insufficient to support the convictions. The judgments of the trial court are affirmed.

**Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Amy Harwell and Matthew Robnett, Assistant Public Defenders (at trial) and James P. McNamara, Assistant Public Defender (on appeal), for the appellant, Jose E. Molina.

Paul G. Summers, Attorney General & Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On the morning of January 31, 2003, the victim, Nalini "Priscilla" Haniff, was threatened with a knife, robbed of her money, and raped. The victim, who was pregnant and suffering from morning sickness at the time, was babysitting two children. Just after the parents had left, she heard a knock at the door. When she answered, the defendant asked if her husband was home, explaining that he was there for a job he had promised. When she informed him that her husband was not home and asked the defendant to leave a message, the defendant entered the apartment as she turned for

---

<sup>1</sup>The indictment names the defendant as Roberto C. Perez, a.k.a. Jose E. Molina, a.k.a. Joaquin C. Gomez. At the hearing on the motion to suppress, it was established that the defendant's legal name is Jose E. Molina.

a pen and paper. After asking for a glass of water, the defendant made his way toward the victim, grabbed her by her hair, pulled a knife from his pocket, and forced her into a bedroom. He then demanded money. She complied, hoping "[h]e would just take it and go," and handed him a gift certificate, which he dropped onto the floor. According to the victim, the defendant then pointed the knife to her neck and ordered her to get on the bed and remove her clothes. At that point, she begged him not to hurt her or her baby and the defendant agreed to use a condom that she provided. He penetrated the victim vaginally while continuing to hold the knife to her neck. When he left the apartment, she checked on the children and then called her husband, who summoned the police. She estimated that the defendant was in her apartment for twenty to twenty-five minutes. Later, the victim identified the defendant from a photographic lineup. She also identified the defendant at trial.

On cross-examination, the victim acknowledged that she had never seen the defendant before the rape and robbery and agreed that she initially assumed the defendant "was legitimate and there to talk to [her] husband." The victim confirmed that she had reported to police that the defendant appeared to be Hispanic. She estimated his age and height, described his clothing, and recalled that he did not have any pubic hair. She conceded that she did not tell the police of any scars or other distinguishing marks on the defendant, explaining that he never took off his jacket and that she did not notice any hand tattoos.

During the trial, the victim's husband, Mike Haniff, testified that he received a call at approximately 10:30 a.m. from his wife, who told him that she had been robbed. He rushed home and found her "on the couch, all curled up, crunched up." When she reluctantly told him that she had also been raped, he immediately called 911.

The victim's neighbor, Etta Pruett-Smith, testified that on the morning of the robbery and rape, a man had knocked on her door to ask if any "Spanish people" lived next door. She recalled that she answered, "yes," shut her door, and shortly thereafter made a trip to a bank. When she returned about twenty minutes later, the police had blocked the entrance to her apartment and an officer informed her that the victim had been raped. Ms. Pruett-Smith first exclaimed, "He raped her?". She then informed the officers that a man had knocked on her door earlier that morning and asked about her neighbors. Later, she selected the defendant from a photographic lineup, identifying him as the man who had been to her apartment that morning. She described her identification as "very sure" and remembered signing a paper that documented which photo she had selected.

Detective Suzanne Stephens with the Metropolitan Nashville Police Department testified that the victim underwent a Medical/Legal Examination by a team of nurse practitioners at the hospital. She stated that although the exam did not provide any evidence linking the defendant to the crime, that result was not surprising because the defendant had worn a condom. She recalled that the victim gave consistent descriptions of the defendant, noting that he obviously had bad teeth. When the defendant was arrested, Detective Stephens observed that he did indeed have "really bad teeth . . . [with] some kind of fillings that were noticeable." She testified that when she compiled photographs for the lineup, she selected photos of five men who looked similar to the defendant. Detective Stephens testified that the victim selected the defendant out of the lineup "more or less immediately"

and with complete confidence and that on the following day, Ms. Pruett-Smith also made an "immediate" identification. She testified that each woman also signed a "photo identification form" confirming their selection of the defendant.

On cross-examination, the detective acknowledged that she was unaware that one of the men in the lineup was not Hispanic. She explained that she did not know the names of the men and was basing her selections strictly upon whether the men looked similar to the defendant. The detective confirmed that the victim had recognized the cologne that the defendant had worn and had also reported to her that the defendant did not have any pubic hair. The detective conceded that officers made no investigation as to whether the defendant had any pubic hair, explaining "that is something that could change quickly." Detective Stephens also testified that she did not recall the victim saying that the assailant had tattoos.

Charles Ray Blackwood, Jr., an officer in the Identification Section of the Metropolitan Nashville Police Department, testified that he arrived at the victim's residence around 1:20 p.m. on the afternoon of January 31, 2003. He interviewed the officers at the scene and took several photographs, which were introduced into evidence. The state also introduced a crime scene diagram sketched by Officer Blackwood. He testified that he was able to detect a latent fingerprint on a gift certificate that was recovered from the victim's residence, a print that he forwarded on for examination. The officer also collected a condom wrapper at the scene and presented it as evidence at the trial.

Linda Wilson, the Metropolitan Nashville Police Department officer who analyzed the latent fingerprints found on items collected from the victim's residence, testified that she received photographs of the prints, entered the prints lifted from the gift certificate into a computer database known as the Automatic Fingerprint Identification System, and received a list of known fingerprint candidates. She testified that the first candidate on the list was the defendant. The defendant's fingerprint received a score of 3574 whereas the next candidate on the list received only a score of 830, which, Ms. Wilson agreed, was a "fairly significant difference" indicating that the print on the gift certificate matched that of the defendant. The officer testified that she had not spoken to anyone involved in the investigation prior to examining the fingerprints. She explained that she also personally compared the print recovered from the gift certificate and the defendant's fingerprints and determined that they matched. She testified that her supervisor verified her conclusion. On cross-examination, however, Officer Wilson acknowledged that there was no way to determine the age of a latent print. She confirmed that the victim and her husband provided their fingerprints to her office to be used to eliminate prints found at the scene. The officer stated that she analyzed ten to twelve prints recovered from the scene, including a palm print, and was unable to determine who left the majority of those prints.

At the close of the state's case, it was stipulated that the defendant was arrested on charges related to this case on February 11, 2003, and had remained in custody continuously since that date.

Miguel Coias, an investigator with the Public Defender's Office, testified that he took pictures of the defendant's teeth and hands on the previous day. These photographs were introduced into evidence. The defense then rested its case.

## I.

In this appeal, the defendant first contends that the trial court erred by denying his motion to suppress identification evidence. Specifically, the defendant argues that the photographic lineup identifications by the victim and Ms. Pruett-Smith should have been excluded because they were unreliable as a result of unnecessarily suggestive procedures. He claims that when the victim observed color photographs, the defendant was the only man wearing an orange, jail-issued jumpsuit. He also asserts that the in-court identifications were improper.

At the hearing on the motion to suppress, Detective Stephens testified that she compiled photographs used in the lineup based upon the similarity of appearance to the defendant. She explained that she decided to conduct the lineup with black and white photographs because the defendant was wearing the orange, jail-issued jumpsuit and because another man was wearing an orange-collared shirt. According to the detective, the victim immediately identified the defendant as the man who raped and robbed her. The state introduced a "Photograph Identification Form" that confirmed the identification was from a black and white photograph. The detective stated that the victim might have seen the color photographic lineup but only after her initial identification of the black and whites. The detective conducted a separate photographic lineup with Ms. Pruett-Smith the following day. She testified that Ms. Pruett-Smith also identified the defendant from the black and white lineup, which was also confirmed by a separate "Photograph Identification Form."

The trial court denied the defendant's pretrial motion to suppress the eyewitness identifications, specifically finding that the lineup was not impermissibly suggestive because the witnesses made their identifications from black and white photographs. The trial court accredited the testimony that neither the victim nor the witness viewed the color photographs until after they made their identifications. Additionally, the trial court found that even if the lineup had been suggestive, "both witnesses possess an independent basis for an in-court identification, making their identifications admissible."

When the trial court makes a finding of facts at the conclusion of a suppression hearing, the facts are accorded the weight of a jury verdict. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The trial court's findings are binding upon this court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also Stephenson, 878 S.W.2d at 544; State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). Questions of credibility of witnesses, the weight and value of the evidence, and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. Odom, 928 S.W.2d at 23. Where, as here, the suppression of the evidence in question does not involve issues of credibility, our standard of review is de novo without a presumption of correctness. See State v.

Binette, 33 S.W.3d 215, 217 (Tenn. 2000). The evidence involved in this issue is the photographic array itself, which involves no issue of credibility and which this court is just as capable of reviewing as the trial court. See id.

In Neil v. Biggers, 409 U.S. 188, 198-99 (1972), the United States Supreme Court established a two-part analysis to assess the validity of a pretrial identification. Id. at 198-99. First, trial courts must determine whether the procedure used to obtain the identification was unduly suggestive. Id. at 198. A violation of due process has occurred if the identification procedure is so suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Id.; see Simmons v. United States, 390 U.S. 377, 384 (1968). If a court finds that the identification procedure was unduly suggestive, the court must determine whether, under the totality of the circumstances, the identification is nevertheless reliable. Biggers, 409 U.S. at 199; State v. Brown, 795 S.W.2d 689, 694 (Tenn. Crim. App. 1990). This standard was adopted by our supreme court in Bennett v. State, 530 S.W.2d 511, 512-15 (Tenn. 1975). A finding that the pretrial identification was unreliable will also require the exclusion of a subsequent in-court identification by the same witness. State v. Philpott, 882 S.W.2d 394, 400 (Tenn. Crim. App. 1994). Factors to be considered are as follows:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (2) the witness's degree of attention at the time of the crime;
- (3) the accuracy of the witness's prior description of the criminal;
- (4) the level of certainty demonstrated at the confrontation; and
- (5) the time elapsed between the crime and the confrontation.

Biggers, 409 U.S. at 199; see also Philpott, 882 S.W.2d at 400.

Here, the victim identified the defendant as the perpetrator from a photographic lineup. Ms. Pruett-Smith identified the defendant as the man who had come to her door and asked if any "Spanish people" lived next door, referring to the victim's apartment. A review of the photographic lineup establishes that the identification procedure was neither unnecessarily or impermissibly suggestive nor likely to create a substantial likelihood of irreparable misidentification. The other men included in the lineup are similar to the defendant in age, size, and complexion. Although one of the men is evidently not of Hispanic origin, that fact is not readily apparent because the photographs are in black and white. The principal complaint is that the defendant is the only person in the lineup wearing a jail uniform. Because, however, the photographs are not in color, the defendant simply appears to be wearing a t-shirt under a collared shirt. The bright orange color of the uniform is not discernable. No other insignia or design characteristics indicate that the defendant was in a jail uniform. See State v. Kenith A. Nathaniel, No. W2001-01831-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., at Jackson, June 19, 2002) (holding that a photographic lineup was not impermissibly suggestive where the defendant was the only individual wearing an orange prison uniform); cf. Wilbert Rogers v. State, No. W2004-00654-CCA-R3-PC, slip op. at 2 (Tenn. Crim. App., at Jackson, Feb. 22, 2005) (holding that "a mug shot . . . from a prior arrest . . . did not necessarily imply that the defendant had a prior record"). The photographic lineup was not suggestive. It is, therefore, unnecessary to apply the totality of the circumstances test described in

Biggers. See State v. Butler, 795 S.W.2d 680, 686 (Tenn. Crim. App. 1990) (holding that Biggers analysis does not apply to a photographic lineup that was not unduly suggestive due to close similarities in the age, build, complexion, hair, and eye color in all but one of the participants).

## II.

The defendant also asserts that the evidence was insufficient to support the convictions for aggravated robbery and aggravated rape. He contends that the state failed to prove his identity as the perpetrator. The state argues that the evidence was sufficient.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Identity, of course, is an indispensable element. See White v. State, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975). Our law provides that identification of the perpetrator of a crime may be accomplished by either direct or circumstantial evidence, or both. State v. Thompson, 519 S.W.2d 789, 793 (Tenn. 1975). The determination of identity is a question of fact for the jury after consideration of all competent evidence. See Biggers v. State, 411 S.W.2d 696, 697 (Tenn. 1967); Sanders v. State, 281 S.W. 924, 924 (Tenn. 1925); State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); State v. Crawford, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982).

Initially, the defendant has failed to include a complete transcript of the trial. Pages 81 through 94, consisting of the redirect examination of Ms. Pruett-Smith, the testimony of Officer Kyle Shedron in its entirety, and the beginning of the direct examination of Detective Stephens, are missing. It is the duty of the appellant to prepare a complete and accurate record on appeal. Tenn. R. App. P. 24(b). The failure to prepare an adequate record for review may result in a waiver of an issue. Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997).

As to the substantive issue, the victim recognized the defendant as the man who raped and robbed her. The entire incident lasted at least twenty minutes. The victim was able to observe her assailant in detail. He was described as Hispanic with bad teeth. Both the victim and the neighbor identified the defendant when presented with a photographic lineup. A fingerprint found on a gift certificate at the scene of the crimes matched that of the defendant. "Issues of identity and credibility are classic jury questions." State v. Joseph B. Thompson, No. E2002-00061-CCA-R3-CD, slip op.

at 6 (Tenn. Crim. App., at Knoxville, Mar. 17, 2003). In this instance, the jury chose to accredit the testimony of the state's witnesses, which was its prerogative. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). In our view, the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that the defendant committed the crimes.

Accordingly, the judgments of the trial court are affirmed.

---

GARY R. WADE, PRESIDING JUDGE